80-296

Supreme Court, U. S.
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No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER 1980 TERM

EMPRESAS ELECTRONICAS WALSER, INC.
ROBERT J. WALSER AND GEORGIA M. COLON DE WALSER

PETITIONERS

vs.

THE UNITED STATES

RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES
October Term 1980

EMPRESAS ELECTRONICAS WALSER, INC.
ROBERT J. WALSER AND
GEORGIA M. COLON DE WALSER
PETITIONERS

VS

THE UNITED STATES
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioners Empresas Electronicas Walser, Inc., Robert J. Walser and Georgia M. Colon de Walser, respectfully pray that a writ of certiorari issue to review the order and opinion of the United States Court of Claims entered on 28 March 1980.

I QUESTIONS PRESENTED FOR REVIEW

The first question is whether this action for breach of an alleged contract between the Small Business Administration (SBA) and Empresas Electronicas Walser, Inc. (EEW) was properly terminated in the US Court of Claims by a Summary Judgment on grounds that no contract existed.

The threshold question is whether the documentary and testimonial evidence establish that a contract was indeed formed between SBA and EEW.

The background question is whether SBA, in the administration of Certificate of Competency (COC) and 8(a) Minority programs, can and does obligate the United States to specific agreed upon steps in the economic life of the small business due to the heavy influence of SBA in the plans and operations of the business.

II PARTIES TO THE PROCEEDING

The parties are Empresas Electronicas Walser, Inc. and the owners of EEW, Robert J. Walser and Georgia M. Colon de Walser, as petitioners; the United States as respondent.

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1. Court of Claims Order dated 28 March 1980
2. Court of Claims order dated 30 May 1980

IV TABLE OF AUTHORITIES

Cases cited:

Adickes vs. Kress, 398 US 144

Peoples Outfitting vs GE Credit Corp., 549 F 2° 42

Poller vs Columbia Broadcasting System 368 US 464

Statutes and Regulations:

Rule 56 of the Federal Rules of Civil Procedure

13 CFR 124.8-15 (renumbered to 125.5)

13 CFR 124.8-16 (renumbered to 125.5(a)(b)(c))

Texts cited:

Moores Federal Practise R56 41-1

V OPINION BELOW

The Order and opinion of the US Court of Claims appears in the appendix.

VI JURISDICTION

The US Court of Claims ordered a Summary Judgment dismissal of this case on 28 March 1980. Petitioner filed for rehearing, this was denied on 30 May 1980. The US Supreme Court has jurisdiction by writ of certiorari over decisions of the US Court of Claims by authority of 28 USC 1255(1).

VII STATUTES AND REGULATIONS PERTINENT TO CASE

1. *Rule 56 Federal Rules of Civil Procedure*
Rule 56(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

2. *13 CFR 124.8-15 and 13 CFR 124.8-16*

(note: these two sections have been renumbered to be 13 CFR 125.5 since the time period of the case)

CERTIFICATES OF COMPETENCY

124.8-15 Definition

A Certificate of Competency (COC) is a written instrument issued by SBA to a Government Contracting Officer, certifying that a small concern or group of concerns named therein possesses the capacity and credit to perform a specific contract.

124.8-16 Issuance

(a) Government contracting officers, upon determining that a small business qualifies for award in all respects other than capacity or credit to perform the contract, notifies SBA of such determination. Award is withheld by the contracting officer for a period up to 15 working days following the date of receipt by SBA of notice of such determination (with appropriate documentation) in order to permit SBA to investigate and certify as to the bidder's capacity and credit.

(b) Upon receipt of this notification, SBA personnel then contact the company concerned to inform it of the impending decision, and to offer an opportunity to apply to SBA for a COC. A concern wishing to apply to SBA for a COC is furnished a Form 74 which is filed with the SBA regional office for the geographic area within which he is located. Upon timely receipt of a COC application, a team of financial and technical personnel is sent to the firm to investigate the competency, as to capacity and credit, of the applicant to perform the proposed contract and make recommendations to the Regional Director.

(c) If the Regional Director's decision is negative, the COC is denied and both the firm and the procuring activity are notified. If the Regional Director's decision is affirmative and the procurement is less than $250,000,

> the Regional Director issues a COC. . . . By the terms of the Small Business Act, the COC is conclusive on questions of capacity and credit. Contracting officers are authorized to award a contract without requiring the firm to meet any other requirements with respect to capacity and credit.

VIII STATEMENT OF THE CASE

The petitioner claims that the Summary Judgment against him is in error for two reasons: there exists a genuine controversy of material fact and therefore Rule 56 prohibits a summary judgment, and the judgment itself is contrary to the governing regulation cited by defendant United States.

To demonstrate these claims, the facts of the case are first presented, then the judicial history.

FACTS OF CASE

Empresas Electronicas Walser, Inc. (EEW), plaintiff and petitioner, is a small defense electronics manufacturer located in San Juan, Puerto Rico and founded in 1963.

June 1970, EEW was the responsive low bidder on two US Dept. of Defense contracts—a $329,000 contract to manufacture US Navy Radiac sets, and a $444,000 contract to manufacture audio intercommunication controls for US Army helicopters.

Armed Services Procurement Regulations (ASPR's) required that every low bidder on open procurement be surveyed to determine if the bidder was capable of doing the contract that he had bid on.

EEW was surveyed by both Army and Navy; both recommended that the contract not be awarded, citing as reasons a lack of capacity and credit.

When a survey is negative, and the bidder is a small business, the procuring agency is required to notify SBA. When so notified, SBA informs the bidder and offers SBA assistance and an opportunity for a possible Certificate of Competency (COC).

If SBA determines the small business capable as to capacity and credit, SBA is authorized to issue a COC. This COC is conclusive on the procuring agency as to capacity and credit. *13CFR124.8-15 & 16* (renumbered to 13CFR125.5)

July 1970, SBA notified EEW of the Army and Navy surveys and offered COC assistance. EEW accepted the SBA offer and formally requested that SBA begin COC action on both contracts.

Before the bids, EEW had 4,000 square feet of production space. SBA engineers told EEW to get additional space, so in Sept. 1970, EEW moved into a new 12,000-square foot building in an industrial park. EEW bought more production machinery and hired additional technical talent. By these actions EEW met the capacity requirements for the new contracts.

In finance, the Army and Navy surveys cited lack of working capital and credit. SBA helped EEW prepare a cash flow projection of the new contracts. SBA combined this cash flow with the available EEW resources and advised EEW that it needed $100,000 to finance the new contracts.

Sept, 1970, EEW applied for a $100,000 SBA loan.

Oct. 1970, EEW attended a meeting in San Juan with SBA officials from both San Juan and New York Regional headquarters. SBA told EEW that SBA had determined that EEW was fully qualified to perform on both the Army and the Navy contracts, but that SBA was not convinced that EEW could or should do both contracts at the same time.

SBA requested that EEW agree to the Army contract and withdraw from the Navy contract. This SBA request was logical. The Army contract was bigger, $444,000 vs. $329,000, and was for three years of production compared to one year of the Navy.

Further, the Army contract COC could be authorized by the Regional Director without going to Washington, a route that would take longer. This was because only the first year of the

Army contract was funded, $159,000, the second and third years depended on future years appropriations. This put the Army COC within the $250,000 approval limit of the Regional Director.

At this same meeting, SBA said that SBA was in an embarrassing position on the Navy contract, and if EEW agreed to withdraw its request for the Navy COC, EEW would help SBA by doing so immediately.

An EEW official had company letterhead in his briefcase, and so the letter withdrawing the EEW request for the Navy contract COC was typed in the SBA office during the meeting, signed and handed to SBA.

This letter is *exhibit No. 1* in the record and *exhibit B* in the US Motion for Summary Judgment.

SBA officials told EEW that with this action the Army contract would definitely be awarded, that EEW could count on it, and advised EEW that it should expedite the application for the $100,000 SBA loan needed for the contract.

This promise to award the Army contract was made by an official who reported to the Regional Director, the Regional Director was not present at the meeting but he did talk by telephone twice during the meeting with the official who made the promises. The Regional Director is the official who is authorized by law to issue the COC, and in effect award contracts. *13CFR124.8-16.*

Mid-October 1970, SBA asked EEW if EEW was interested in direct award negotiated contracts under the SBA 8(a) minority program. EEW expressed interest and agreed to participate. As part of the qualification, EEW was required to produce and submit to SBA for approval a "Business Plan for Growth" (Business Plan) *Exhibit No. 33* in the record.

This Business Plan was an analysis of the EEW technical and financial capability, current business and income, future goals, and a showing as to how the SBA 8(a) contracts would help EEW reach these goals.

EEW produced and submitted for SBA approval a Business Plan that showed company income for the next three years to be almost entirely from the Army contract, the same contract that SBA had promised to EEW a few weeks before. SBA approved the Business Plan and EEW began in the SBA 8(a) program.

Late October 1970, the SBA Regional Director met with EEW in San Juan. He thanked EEW for helping SBA out of its problem on the Navy COC, and he confirmed what EEW had been promised in the meeting earlier that month, that SBA had decided that EEW was completely qualified to perform on the Army contract and that he, the Regional Director, was confirming that EEW would get the contract, that EEW could "count on it." The Regional Director confirmed that EEW had been investigated and recommended for award and that he had decided to award the COC.

January 1971, SBA notified EEW the loan was ready for approval, except for the section of the application for the loan where EEW shows its ability to repay the loan. SBA stated that the market survey used by EEW was not sufficient. SBA explained the legal requirement that SBA have the most positive assurance possible that the loan could be repaid from expected income of the borrower.

SBA told EEW to submit as part of the loan application the Business Plan developed in October 1970 for the SBA 8(a) program, that the Business Plan was approved by SBA and it well described the EEW situation. This Business Plan depended on the Army contract being awarded to EEW for income, and shows the Army contract as in process of being received by EEW.

EEW submitted the Business Plan to show its payback ability. SBA approved the loan for $76.000, lowered because the Navy contract needs had been deleted.

Concurrently, SBA completed formal technical and financial recommendations as part of the COC procedure, *exhibits 8 & 9* of the record. Both recommend award, both cite the loan

and Army contracts as the source of the loan payback, and both were used by SBA as basis for the loan disbursement.

April 15, 1971, SBA and EEW closed the loan for $76,000. The NOTE signed by SBA and EEW contains this clause on page 2, Negative Covenants 2(a), line 8, in describing an event of fault:

"Holder's discovery of the Undersigned failure in any application of the Undersigned to Holder or SBA to disclose any fact deemed by Holder to be material or of the making therein or in any of the said agreements, or in any affidavit or other document submitted in connection with said application or in the indebtedness, or of any misrepresentation by, on behalf of, or for the benefit of the undersigned."

The MORTGAGE DEED signed by SBA and EEW contains the following at page 6, clause 8:

"(8) All clauses of this deed or part thereof are essential and the MORTGAGEE may declare the NOTE due and payable for non-compliance with any clause of this deed or portion thereof."

"The NOTE may be declared due and payable if the representations and reports of the MORTGAGORS to the MORTGAGEE, in order to induce the latter to grant him the loan evidenced by the NOTE prove to be false."

These two clauses incorporate into the loan agreement the representations and other documents that were part of the loan application.

Thus the loan agreement includes the Business Plan and that part of the Business Plan whereby SBA approves that SBA will award the Army contract to EEW. Actually with this inclusion, the loan agreement contains the intent of the parties, that the loan was made on the basis that EEW would receive the Army contract as the primary source of income for the first three years of payback on the loan.

July 1971, the Army contract still not received, EEW officials went to New York. In meeting with the SBA Regional Director, he, the Regional Director, reiterated his earlier uncon-

ditional promise that the Army contract would be sent to EEW, and within a very few weeks. During the meeting, the Regional Director called in the SBA Director of 8(a) programs and said to him, ". . . EEW has the Army contract coming but they need some immediate work, so get them a couple of small contracts for bread and butter while we finish the paper work on the Army contract."

August 31, 1971, SBA notified HEW that the COC would not be issued, that there would be no Army contract.

This denial of the COC reversed every action, every verbal and written expression of intent, by every SBA official from Regional Director on down, of the previous fourteen months. It caused EEW to lose all the money expended for the 14 months that it held production capacity idle while awaiting the Army contract, and because the Army contract had been so integrated into all of the EEW operations by SBA, this SBA breach of its contractual obligations caused a rupture of all EEW operations and forced the closing of the EEW factory.

All of the facts as presented in this statement of the case are contained in the case record, in sworn answers to interrogatories and in the SBA documents stipulated into the record.

This case has never been to trial.

JUDICIAL HISTORY OF CASE

5 Sept 1973	United States filed for collection of money and foreclosure of mortgage in US District Court, case 808-73; EEW counterclaimed breach of contract by SBA.
6 Aug 1975	EEW agreed to a Motion by United States to split the case into 1) a consent decree in District Court wherein EEW acknowledged the loan and agreed to repay, and 2) a transfer of the breach of contract claim to the US Court of Claims.
	In compliance with the consent decree,

	Robert and Georgia Walser repaid the entire loan, with interest, out of their personal savings.
30 Jun 1977	the breach of contract action was transferred to the US Court of Claims to become EEW vs the United States, Case 537-77.
9 April 1979	defendant United States moves for Summary judgment, the case never having been heard on its merits.
5 March 1980	US Court of Claims hears oral argument on the US Motion for Summary Judgment.
28 March 1980	US Court of Claims ordered Summary Judgment in favor of defendant United States.
18 April 1980	EEW filed timely motion for rehearing of the Summary Judgment Order.
30 May 1980	US Court of Claims denied the EEW motion for rehearing.

Jurisdiction of the original case in US District Court is under 28 USC 1346; jurisdiction in the US Court of Claims is under 28 USC 1491.

IX REASONS THAT THE SUPREME COURT SHOULD GRANT THIS PETITION OF CERTIORARI

1. THE DECISION BELOW CONFLICTS WITH RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 56 provides for Summary Judgment when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

The US Court of Claims Order in this case is based on a decision that no contract existed because the required agency procedure had not been followed. The decision that a particular procedure was or was not followed is itself a conclusion of fact. There is strong evidence in the record that the proper procedure was in fact followed land that consequently the Court Order is in basic error. The record shows exhibits 32, 33, 36, 37, 38, 39, 41, 42, 43, 44 and 45 as documents stipulated into the case file and forming part of the many representations and internal SBA documents that together are the total loan agreement. This record is in complete support of the EEW position that SBA knowingly and intentionally obligated the United States, and did so within the proper procedures.

This is the procedure required by law for SBA to issue a COC, as entered into the record by defendant United States:

> "(b) . . . Upon timely receipt of a COC application a team of financial and technical personnel is sent . . . to investigate . . . and make recommendations to the Regional Director.
>
> (c) If the Regional Director's decision is affirmative, and the procurement is less than $250,000, the Regional Director issues the COC . . ." *13 CFR 124.8-16* renumbered 125.5)

This procedure was followed by SBA in the consideration and decision to award the COC to EEW.

But the US Court of Claims describes a procedure that differs significantly:

> ". . . Here the procedure required approval by a Certifi-

cate of Compency review committee. The committee disapproved the application. Thereafter Mr. Villamil notified the plaintiff company in writing, that the COC would not be issued. Such recorded proceedings are inconsistent with an intent to be bound. If Mr. Villamil really told plaintiff that it had a COC he exceeded his authority and defendant can disavow his words."

Court of Claims Order at page 3

The Court states the procedure required approval by a COC review committee. Such committee does not appear in any published regulation or procedure of SBA, nor does the Court hint as to the origin of this committee.

Defendant United States submitted the procedure here governing, 13 CFR 124.8-16, which contains no mention of a review committee, nor has the United States ever alleged that a committee is part of the required procedure.

Further, the regulation shows that the Regional Director Mr. Villamil did have the authority to decide and to issue a COC, and there are *no* grounds to disavow his commitment.

The US Court of Claims Summary Order is in direct conflict with Rule 56 because there exists a genuine controversy of material fact, because the Court is in error in its interpretation of the facts in the record, and because a reading of the pertinent law shows that the Order is contrary to that law.

For these reasons the US Supreme Court should exercise its duty of supervision of the courts and revoke this US Court of Claims Order and remand to the same court for trial on the merits.

2. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THE US SUPREME COURT AND COURTS OF APPEALS

The US Court of Claims in its order notes that the threshhold question is whether or not a contract actually existed

between the parties, in the absence of a formal contract document. The record contains strong evidence that the parties did knowingly form a contract.

Since the Court has never allowed this question to be examined in open court, in trial on the merits, the intent of the parties has never been determined. Intent of the parties is vital to the formation of a contract, and in consideration of whether a contract was in fact formed.

The issue of contract formation is an issue of intent.

It is accepted principle of law that *intent* must not be judged in summary fashion. *Moores Federal Practise* at *R56 (41-1)*, citing numerous decisions — *Adickes vs. Kress, 398 US 144, Poller vs Columbia Broadcasting System, 368 US 464,* and most similar to the case under consideration, a leading case from the Seventh Circuit on summary judgment, *Peoples Outfitting vs GE Credit Corp. 549 F2° 42,* wherein the Court states:

> "... in a breach of contract action ... where breach of oral contract is alleged ... summary judgment in favor of defendant ... was precluded by factual controversy as to whether the parties intended to be bound by oral contract ..." *Peoples Outfitting vs GE Credit Corp., 549 F 2° at 43.*

"Intent" is an issue of fact that must be determined in trial on the merits, it cannot be judged in a summary procedure.

The US Court of Claims Order is in direct conflict with the Seventh Circuit decision in *Peoples Outfitting* and with the basic precepts laid down by the US Supreme Court and the leading theorists.

For this reason the US Court of Claims Order must be revoked and be remanded to the same court for a full trial on the merits of the case.

3. THE DECISION BELOW EVADES A MOST IMPORTANT QUESTION, THE FORMING OF OBLIGATIONS OF THE UNITED STATES BY SBA IN ITS ADMINISTRATION OF THE PROCUREMENT ASSISTANCE PROGRAMS—CERTIFICATES OF COMPETENCY AND 8(a) MINORITY.

There appears to be no jurisprudence wherein the Courts probe the manner and extent of formation of obligation of the United States by SBA as it administers the COC and 8(a) programs for development of small and minority owned business.

A strong environment for forming obligations exists because every small business that participates must submit to some degree of control by SBA to receive the benefits that SBA promises.

There should rightfully be a presumption of good faith in the acts of both SBA and the small businesses, and that the benefits to the small business are normally beneficial to that business.

But the *fundamental question* that has never been subjected to effective scrutiny by the Courts is this:

> in investigating, evaluating, analyzing, counseling, assisting, requesting, asking, insisting, on actions by a small business looking for contracts, to what extent does SBA obligate the United States for these controls, and does SBA/United States fulfill these obligations that are formed?

There are some forty small businesses in Puerto Rico that participate at some level in these programs. Petitioner has no information on the national total participating, but logic says that the number must be in the thousands.

Not only is it important that a significant number of small businesses are affected by the obligations that grow out of the SBA actions, these particular businesses are the most active and enterprising of all the small businesses, the very ones that promise the most for the future of this nation.

When a small business works with SBA to obtain the promised contract, the business is required to invest in, to commit and hold facilities, personnel and financial capacity for almost indeterminate times waiting for the moment when the promised business arrives.

It is not sufficient that a new machine be on the market, the company must purchase and install and hold idle the machine to demonstrate the production capacity; it is not sufficient that electronic engineers are availabale in the labor market, the company must hire electronic engineers and quality control managers and maintain them on the payroll for the day that they will be needed; it is not sufficient that a company claim that it can design a new product, the company must actually do the design and submit it to SBA as proof of its claims.

These may or may not be considered faults with the system, but they clearly demonstrate that an ambient exists for the generation of many obligations on the United States.

Petitioner submits that his case is representative of many similar cases of small businesses that participate in these SBA programs, that in this case the United States did become obligated to deliver to the petitioner a particular, agreed-upon contract, and that this claim can be proved in trial on the merits of the claim.

Petitioner prays that this Court recognizes the vital importance of this SBA/small business formation of obligations and the effect that it has on the success or failure of the assistance programs, and then revoke the Summary Judgment of the Court of Claims so that the merits of the case may serve the future of these very programs.

CONCLUSION

For all these reasons petitioner prays that this US Supreme court issue the writ of certiorari and revoke the Summary Judgment of the US Court of Claims and remand the case to the Court of Claims with instructions that trial be held.

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Petitioner and
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APPENDIX

Court of Claims Order dated 28 March 1980.

IN THE UNITED STATES COURT OF CLAIMS

No. 537-77

EMPRESAS ELECTRONICAS WALSER, INC., ROBERT JOSEPH WALSER, (also known as ROBERT J. WALSER) and GEORGIA MERCEDES COLON (also known as GEORGIA M. WALSER and as GEORGIA MERCEDES COLON DE WALSER)	)	Government contracts; binding effect of promise by a Small Business Administration official to issue a COC
v.	)	
	)	Mar 28 1980
UNITED STATES	)	

Before NICHOLS, *Judge*, Presiding, KASHIWA and SMITH, *Judges*

ORDER

Plaintiff Empresas Electronicas Walser, Inc. (EEW) and others brought this action originally as a counterclaim to a suit by the United States in the US District Court for the District of Puerto Rico. The other plaintiffs are Robert J. Walser and Georgia M. Walser, owners of the corporation. The US District Judge severed it and transferred it here under 28 USC 1406, because he identified it as a claim under the Tucker Act, 28 USC 1346, of which we have exclusive jurisdiction, as it sounds primarily in contract and the amount at issue is over $10,000. There are, however, some allegations that

seem to sound in tort and we must fashion our disposition of the case in light of the fact that we do not have jurisdiction of tort claims. Defendant has a counterclaim. The case is before us on defendant's motion for summary judgment.

The threshold question is whether the Small Business Administration (SBA) bound the United States by contract, express or implied, to award the plaintiff corporation a Certificate of Competency (COC) which would have qualified the corporation to receive award of an Army contract. It had bid lowest under both Navy and Army invitations and the Defense Contract Administration (DCASO) had recommended rejection of both bids after preaward survey. For purposes of the motion, we take the facts as plaintiff state them. EEW was persuaded by SBA to withdraw from the Navy contract and to pursue one COC only for the Army contract. There was already an Air Force contract with a $76,000 SBA loan, supported by an earlier COC. Plaintiffs allege that loss of both the Army and Navy awards prevented repayment of the loan, for which the profit under those contracts was needed, and that it had required a large plant and incurred other expenses in anticipation of the increased business which never came through. Also, the plaintiff owners personally guaranteed the loan on the Air Force contract in consideration of the Army contract being promised to EEW on top of the Air Force contract already awarded. Plaintiffs say that the Regional Director, Carlos A. Villamil, made unconditional statements to "plaintiffs" (presumably to the individual plaintiffs) that plaintiff had a contract, and this was "ratified" on may occasions by other SBA representatives.

Plaintiff repeatedly refers us to its answer to interrogatories in the District Court for full details.

There Mr. and Mrs. Walser swore that Mr. Walser had a meeting October 1, 1970, at SBA San Juan, with various

named officials of SBA at which they promised that if EEW withdrew its application for the Navy COC and Award, "SBA would award the Army contract." meaning presumably, it would issue the COC which was all that remained necessary for EEW to obtain the Army contract. They do not allege that Regional Director Carlos A. Villamil, who alone had authority to sign COC's in that region, was present at this meeting. But they say that "every SBA official continually confirmed that EEW would get the contract." In July, shortly before the ultimate rejection, Carlos Villamil stated "that there was no problem, SBA was only awaiting the official rejection form from the Army and that the COC would then be issued to EEW." It appears that the Army had to reject the bidder as unqualified before SBA had a right to interpose its COC, which was, when issued, conclusive.

Defendant responds, citing *Tree Farm Development Corp.* v. *United States,* 218 CtCl_____, 585 F2°493 (1978); *Russell* v. *United States,* 210 CtCl 596, 537 F2°474 (1976), *cert. denied,* 429 US 1073 (1977); *Cutler-Hammer, Inc.* v. *United States,* 194 CtCl 788, 441 F2°1179 (1971), that an agency does not become bound to favorable action on an application until the previous steps have been taken that its procedure requires. Until then there is no intent to be bound. We agree with defendant. Thus oral assurances do not reflect such intent even if they emanate from the very person having authority, at the proper time, to sign the COC. Here the procedures required approval by a Certificate of Competence review committee. The committee

disapproved the application. Thereafter, Mr. Villamil notified the plaintiff company, in writing, that the COC would not be issued. Such recorded proceedings are inconsistent with an intent to be bound. If Mr. Villamil really told the plaintiff it had a COC he exceeded his authority and defendant can disavow his words. *Federal Crop. Ins. Corp.* v. *Merrill* 332 US 380 (1947). We would say that a COC resembles promotion of an officer in the military: as a general

proposition, with a few exceptions, not here applicable, no one is legally entitled to it until he gets it. *Doggett* v. *United States,* 207 CtCl 478 (1975). The minutes of the Review Committee show that it had before it information that plaintiff had not responded to a "show cause" letter under the Air Force contract, and that its balance sheet showed a negative net worth. Plaintiffs could have expected no other decision.

Defendant asserts it is not bound because 31USC200 requires that the instrument to bind it be in writing, that plaintiffs claim mere consequential damages, and that the claim sounds in tort. Our decision on the threshold question moots these issues.

Accordingly, on consideration of the pleadings, the motion, the briefs, the record, and the oral argument of the parties, the defendant's motion for summary judgment is sustained. Plaintiff admits, if this is our conclusion, that it has not other defense against defendant's counterclaim, which is for reprocurement costs under the Air Force contract, and accordingly, judgment is entered for defendant on the counterclaim in the amount of $21,986.92.

The petition is dismissed. Our decision is without prejudice to any tort claim plaintiff may assert against anyone in any other tribunal, but we think

justice does not require retransfer of such claims, since all are presented as dependent on the contract claim.

BY THE COURT

Mar 28 1980

PHILIP NICHOLS, JR.
Judge, Presiding

Court of Claims Order dated 30 May 1980

IN THE UNITED STATES COURT OF CLAIMS

No. 537-77

EMPRESAS ELECTRONICAS WALSER, INC. ET AL.

v.

UNITED STATES

Before NICHOLS, *Judge,* Presiding, KASHIWA and SMITH *Judges*

ORDER

This case comes before the court on plaintiff's motion, filed April 18, 1980, pursuant to Rule 151(b), for rehearing to alter judgment, with reference to the order entered herein on March 28, 1980. Upon consideration thereof, together with the response in opposition thereto and plaintiff's "Informative motion concerning motion for rehearing" filed May 13, 1980, without oral argument,

IT IS ORDERED that plaintiff's said motion for rehearing be and the same is denied

BY THE COURT
PHILIP NICHOLS, JR.
Judge, Presiding

May 30, 1980

Supreme Court, U. S.
FILED
OCT 10 1980
MICHAEL RODAK, JR., CLE

No. 80-296

In the Supreme Court of the United States

OCTOBER TERM, 1980

EMPRESAS ELECTRONICAS WALSER, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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15 U.S.C. (Supp. II) 637(b)(7) 4

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-296

EMPRESAS ELECTRONICAS WALSER, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In August 1971, the Small Business Administration ("SBA") denied the corporate petitioner's[1] application for a Certificate of Competency ("COC").[2] Petitioners contend that various SBA officials had previously represented that a COC would be issued and that the denial of a COC therefore constitutes a breach of contract.

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[1]In addition to the corporation, petitioners include two individuals who are officers and the sole stockholders of the corporate petitioner. See Stipulation of Facts, at 2, *United States* v. *Empresas Electronicas Walser, Inc., et al.*, Civ. No. 808-73 (D. P.R., filed July 2, 1975) (hereinafter "Stipulation"). As used herein, "petitioner" refers to the corporate petitioner.

[2]As applicable in 1971, a COC was a written instrument issued by the SBA certifying that the business entity named therein

1. In mid-1970, petitioner was the low bidder on three Department of Defense contracts with, respectively, the Army, the Navy, and the Air Force.[3] On all three bids, the Defense Contract Administration Services Office ("DCASO") recommended against award on several grounds and referred the matter to the SBA for possible COC action (Stipulation, at 2, 3-4, 7-8).

On January 14, 1971, the SBA issued a COC to the contracting officer in charge of the Air Force contract, and on February 16, 1971, a $63,275.00 contract was awarded to petitioner. Petitioner thereafter defaulted on the Air Force contract and was terminated on October 29, 1971. The government's excess reprocurement costs totalled approximately $22,000.00 (Pet. App. 21; Stipulation, at 7-10).

Meanwhile, in October 1970, the solicitation on the Army contract was cancelled and re-bids were requested. Petitioner was still the low bidder, but DCASO again recommended against award. On March 26, 1971, petitioner applied to the SBA for a COC on the Army contract. Although petitioners allege that various SBA officials represented to them that a COC would be issued, the SBA denied petitioner's application in August 1971 (Pet. App. 19; Stipulation, at 4-7).

In September 1970, petitioner sought a $100,000.00 loan from the SBA (Pet. 6). On April 15, 1971, the loan was made in the amount of $76,000 and was guaranteed by the individual petitioners (*id.* at 8-9). When a default

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possessed the capacity and credit to perform a specific government contract. A COC was conclusive on questions of a prospective government contractor's capacity and credit. See 13 C.F.R. 124.8-16 (1971), as amended, 13 C.F.R. 125.5. See also note 4, *infra*.

[3]In October 1970, petitioner withdrew its application for a COC on the Navy contract. See Stipulation, at 3.

occurred on this loan, the United States brought suit against petitioners in the United States District Court for the District of Puerto Rico. Based upon the SBA's denial of a COC for the Army contract, petitioners counterclaimed for breach of contract. After a consent judgment was entered in favor of the United States on its complaint, petitioners' counterclaim was transferred to the Court of Claims (Pet. 10-11; Pet. App. 18-19).

In the Court of Claims, petitioners again asserted their claim for breach of contract and sought damages of approximately $2.5 million for injury to their business and an equal amount for mental anguish allegedly suffered (Restatement of Counterclaim, As Complaint, at 3). The United States counterclaimed for the amounts of its excess reprocurement costs on the Air Force contract, as to which petitioner admitted liability (Pet. App. 21). On the government's motion for summary judgment, the Court of Claims held that there was no contract between petitioners and the SBA, and accordingly it dismissed their claims without prejudice to their right to bring a tort action in some other forum (*ibid.*).

2. Petitioners have presented no reason justifying review by this Court. The decision of the Court of Claims turns only on the particular facts of this case and does not raise any issue of general public importance. Accordingly, further review is unwarranted.

Moreover, the Court of Claims' decision is correct. Petitioners contend that the decision rests upon a mistaken finding concerning disputed facts as to whether they had a contractual commitment for the issuance of the COC. The Court of Claims took the facts as petitioners stated them, however, and correctly concluded that, no matter what representations had been made to petitioners to the effect that an application for a COC would be

granted, the SBA was not contractually bound thereby. The court explained that "an agency does not become bound to favorable action on an application until the previous steps have been taken that its procedure requires" (Pet. App. 20), and that such steps had not been taken with regard to petitioner's application at the time it allegedly was told that it had a "contract."[4] Furthermore, the Court of Claims noted that petitioner "could have expected no other decision" (*id.* at 21) than the denial of its application in view of its impending default on the Air Force contract. At all events, as the court observed, any statements by the SBA Regional Administrator that led petitioner to believe that it had a commitment for a COC "exceeded his authority" (*id.* at 20) and do not estop the government in a breach-of-contract suit. See, *e.g.*, *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947).

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[4]In addition, petitioners' claims are based upon the mistaken belief that they would necessarily have been awarded the Army contract if a COC had been issued. The statutory and regulatory scheme in effect in 1971, however, made a COC conclusive only as to a prospective contractor's "capacity and credit" and did not require the contracting officer to award a contract without regard to other aspects of responsibility. See Act of July 18, 1958, Pub. L. No. 85-536, Section 2(8)(b)(7), 72 Stat. 391; 13 C.F.R. 124.8-16 (1971). In contrast, the current scheme makes a COC conclusive "with respect to all elements of responsibility, including but not limited to * * * capacity [and] credit * * *," and directs contracting officers to award a contract for which a COC has been issued. See 15 U.S.C. (Supp. II) 637(b)(7); 13 C.F.R. 125.5. Thus, even if the application for a COC had been granted, it is highly speculative whether petitioner, in view of its record, would have been deemed a responsible bidder and awarded the Army contract. See *United States* v. *Thompson*, 168 F. Supp. 281 (N.D. W.Va. 1958), aff'd, 268 F. 2d 426 (4th Cir. 1959); 37 Comp. Gen. 676 (1958).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1980

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RESPONDENT

ON WRIT OF CERTIORARI TO THE
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REPLY TO MEMORANDUM OF THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

none cited

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CASE 80-296

REPLY TO MEMORANDUM OF THE
UNITED STATES IN OPPOSITION

Defendant United States filed on 10 Oct. 1980, copy received by petitioner 20 Oct. 1980, a Memorandum in Opposition to Petitioners Petition for Certiorari. Petitioner submits this Reply to clarify certain points raised by defendant.

On page 2, defendant states that petitioner defaulted on an Air Force Contract and incurred some $22,000 liability for excess reprocurement costs. The Air Force contract was awarded by an SBA COC to manufacture units similar to those of the SBA COC Army contract, subject of this action. For these two contracts, design and production plans were completely integrated, with the knowledge and approval of SBA.

On 31 Aug. 1971 the Air Force contract was on schedule. When SBA denied the Army/COC contract on that day, 31 Aug 1971, this integration of the two contracts made it impossible to complete the Air Force contract as planned.

The Air Force contract cancellation was made the same day that the SBA actions forced the EEW factory to close, 29 Oct. 1971. This cancellation is a direct result of the SBA actions. Petitioners' claim on SBA for damages includes the $22,000 owed to Air Force. Petitioner had a perfect record of delivery on US contracts prior to the 31 Aug 1971 SBA denial of a COC.

On page 3, defendant United States states that the Court of Claims decision is based on facts as stated by the petitioner. Indeed, the Court of Claims decision makes this same statement, and then proceeds to ignore the same facts. In the Petition for Certiorari, pages 12 & 13, petitioner shows that the Court of Claims version of procedures necessary to issue a COC is in error, contrary to law.

The statement by United States page 4, footnote 4,

> "..it is highly speculative whether petitioner in view of his record would have been deemed a responsible bidder and awarded the Army contract..."

is <u>not true</u>. Petitioner had a perfect record to this point. Both Army and SBA have stipulated on file that all other elements of award were approved, <u>only</u> capacity and credit were pending. If SBA had issued the COC, the contract would have been awarded.

Petitioner reiterates that his case has never been to trial, that the summary decision is in error, and that he, perhaps like many other small businesses,

has never been allowed to show in a court of justice how the actions of SBA formed an obligation of the United States, and how the violation of that obligation caused terrible damages on a young and growing electronics firm.

20 Oct. 1980

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